RECORD AND BRIEFS

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IN THE
# Supreme Court of the United States

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM,
*Petitioner*,

v.

ANZ SECURITIES, INC., ET AL.,
*Respondents*.

**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF OF CIVIL PROCEDURE AND SECURITIES LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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## INTEREST OF *AMICI CURIAE*[1]

*Amici* are law professors whose scholarship and teaching focus on civil procedure and/or the federal securities laws. *Amici* have devoted substantial parts of their professional careers to studying those subjects, including conducting theoretical and empirical analyses of how different procedural orderings shape enforcement of the securities laws and other litigation and regulatory schemes.

This brief reflects the consensus of the *amici* that this Court should reverse the Second Circuit's decision and hold that the rule announced in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), protects petitioner from the three-year time-bar in § 13 of the Securities Act. *Amici* are as follows:

Professor Janet C. Alexander is the Frederick I. Richman Professor of Law, Emerita at Stanford Law School.

Professor Stephen B. Burbank is the David Berger Professor for the Administration of Justice at the University of Pennsylvania Law School.

Professor Kevin M. Clermont is the Robert D. Ziff Professor of Law at Cornell Law School.

Professor John C. Coffee, Jr., is the Adolf A. Berle Professor of Law at Columbia Law School.

Professor James D. Cox is the Brainerd Currie Professor of Law at Duke University School of Law.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amici* represents that all parties have consented to the filing of this brief and/or have filed with the Court a blanket consent authorizing such a brief.

Professor Scott Dodson is a Professor of Law and the Harry & Lillian Hastings Research Chair at the University of California Hastings College of the Law.

Professor David Freeman Engstrom is a Professor of Law and the Bernard D. Bergreen Faculty Scholar at Stanford Law School.

Professor Jonah B. Gelbach is a Professor of Law at the University of Pennsylvania Law School.

Professor Norman W. Spaulding is the Nelson Bowman Sweitzer and Marie B. Sweitzer Professor of Law at Stanford Law School.

Professor A. Benjamin Spencer is the Earle K. Shawe Professor of Law at the University of Virginia School of Law.

## SUMMARY OF THE ARGUMENT

In *American Pipe* and its progeny, this Court wisely rationalized class action law and policy under Rule 23 by tolling applicable limitations periods and thus ensuring that asserted class members need not file protective actions to avoid being time-barred in the event class certification is subsequently denied or the original filer turns out to be a flawed class representative. Tolling thus avoids putting injured parties to an unnecessary and unfair Hobson's choice: file a costly and duplicative action or risk surrendering their rights.

The Court's wise approach is now under assault by a series of decisions in the Second Circuit, including the decision below, that threatens to undo the *American Pipe* rule across the waterfront of federal securities laws. Virtually all federal securities causes of action have a two-tiered time bar: a shorter statute of limitations period governed by a discovery rule, and a longer limitations period running from the violation that is sometimes referred to as a "statute of repose."

The Second Circuit's approach, in contrast to the Tenth Circuit's, renders *American Pipe*'s protective rule inapplicable to these latter "repose" periods.

This brief offers a conceptual and empirical analysis of a key issue that overhangs the case: the plausible quantity of wasteful protective filings—including interventions and separately filed lawsuits—that putative class members might make if the Court were to hold that *American Pipe* tolling does not apply to repose periods.[2]

In Part I, we present the results of an empirical study designed to measure the efficiency toll of a decision by the Court limiting *American Pipe*'s reach using data drawn from a comprehensive dataset of securities lawsuits. We count the number of cases in which class certification proceedings overrun repose periods. These are cases for which a narrowing of *American Pipe*'s reach plausibly *could* induce putative class members to make protective filings, whether in the form of interventions or newly filed lawsuits. We estimate that the Second Circuit's approach restricting *American Pipe*'s reach could, if allowed to stand by this Court, induce putative class members to make protective filings in nearly *half* of securities class actions that reach a court order on class certification and at least *one-quarter* of all filed securities class actions. Of course, not all cases in which class certification proceedings extend beyond the repose period would yield protective filings. But simple math shows that, even if protective filings are made in only a small share of cases where they are possible, the ultimate result

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[2] A parallel version of the analysis offered herein appears in David Freeman Engstrom & Jonah B. Gelbach, American Pipe *Tolling, Statutes of Repose, and Protective Filings: An Empirical Study*, 69 Stan. L. Rev. Online 92 (2017).

would be a substantial spike in litigation in the federal courts.

In Part II, we discuss an alternative approach—the "natural experiment" approach used in the social sciences and in empirical legal studies scholarship—to estimating the expected number of protective filings. As we explain, the obstacles to such an approach make it unworkable in the present context. We also point to significant flaws in the primary study which respondents cite in their effort to blunt the concern that denying application of *American Pipe* tolling to repose periods would uncork a substantial flow of protective filings.

In Part III, we explain why the ruled adopted by the Second Circuit limiting *American Pipe*'s reach yields no countervailing benefit. In other words, the efficiency toll if the Court were to adopt the Second Circuit's position limiting *American Pipe*'s reach is not only likely to be significant, but also entirely unnecessary.

Taken together, our analysis makes clear that the Court's affirmance of the Second Circuit's approach risks undermining the core purposes of the *American Pipe* rule: to promote the "efficiency and economy of litigation." *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974).

## ARGUMENT

### I. AVAILABLE EMPIRICAL EVIDENCE SUGGESTS THAT LIMITING *AMERICAN PIPE*'S REACH WILL RESULT IN SUBSTANTIAL NUMBERS OF WASTEFUL PROTECTIVE FILINGS

#### A. Research Design

In this Part, we measure the likely efficiency toll of a decision by the Court limiting *American Pipe*'s reach. We use historical data to count the number of securities class actions producing an order on a motion for class certification in which the court's order granting or denying certification—or, in cases producing multiple certification orders, the last such order—came only after the applicable limitations period had expired.[3] More specifically, we calculate the elapsed number of days between the first day of the class period specified in the operative complaint during class certification proceedings and either: (i) the date of the district court's order on a motion for certification (or, in multi-certification-order cases, the last certification order); or (ii) the date of the district court's order preliminarily approving the settlement class.[4] This calculation permits us to tally the number of cases in which

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[3] *Amici* first presented the empirical analysis that follows to the Court in an *amicus* brief that they filed in *Police & Fire Retirement System of City of Detroit v. IndyMac MBS, Inc.* before the Court's dismissal of the case as improvidently granted, 135 S. Ct. 42 (2014). *See* Br. of Civil Procedure and Securities Law Professors as *Amici Curiae* Supporting Pet., *IndyMac* (No. 13-640).

[4] Keying this calculation to the start of the class period is consistent with § 13's language, which states that the limitations period begins to run when the security was "bona fide offered to the public" (§§ 11 and 12(a)(1) claims) or upon the security's "sale" (§ 12(a)(2) claims). 15 U.S.C. § 77m.

one or more putative class members would have needed, in the absence of tolling, to take protective action in order to preserve the right to proceed if class certification were later denied.

We constructed two datasets from a comprehensive database of securities case filings[5] for the period 2002-2009.[6] One data set contains all cases asserting only claims under §§ 11 or 12 of the Securities Act over that period (as in this case); there were 86 such cases. The other contains cases asserting claims under § 10(b) of the Securities Exchange Act and SEC Rule 10b-5, whether or not those cases also asserted other types of claims (including claims under §§ 11 and 12) filed during the same period; there were roughly 1200 § 10(b) cases filed during 2002-2009, from which we drew a random sample of 500 cases for analysis. We isolate cases asserting only §§ 11 and 12 claims because those claims are subject to the three-year limitations period in § 13 of the Securities Act,[7] while § 10(b) claims are subject to a five-year limitations period.[8]

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[5] Stanford Securities Litigation Analytics, which comprehensively tracks federal securities class actions, graciously provided data. *See* https://sla.law.stanford.edu/ (last visited Mar. 3, 2017). SSLA also provided the data for the analysis performed in Part II, *infra*.

[6] We used 2002 as the front-end of our study window because data were not available for cases filed earlier; we used 2009 as our window's back-end because, at the time the data were collected, it was the most recent year for which nearly the entire inventory of filed cases had been conclusively resolved, thus permitting a clean assessment of whether each sample case yielded a certification order beyond the limitations period.

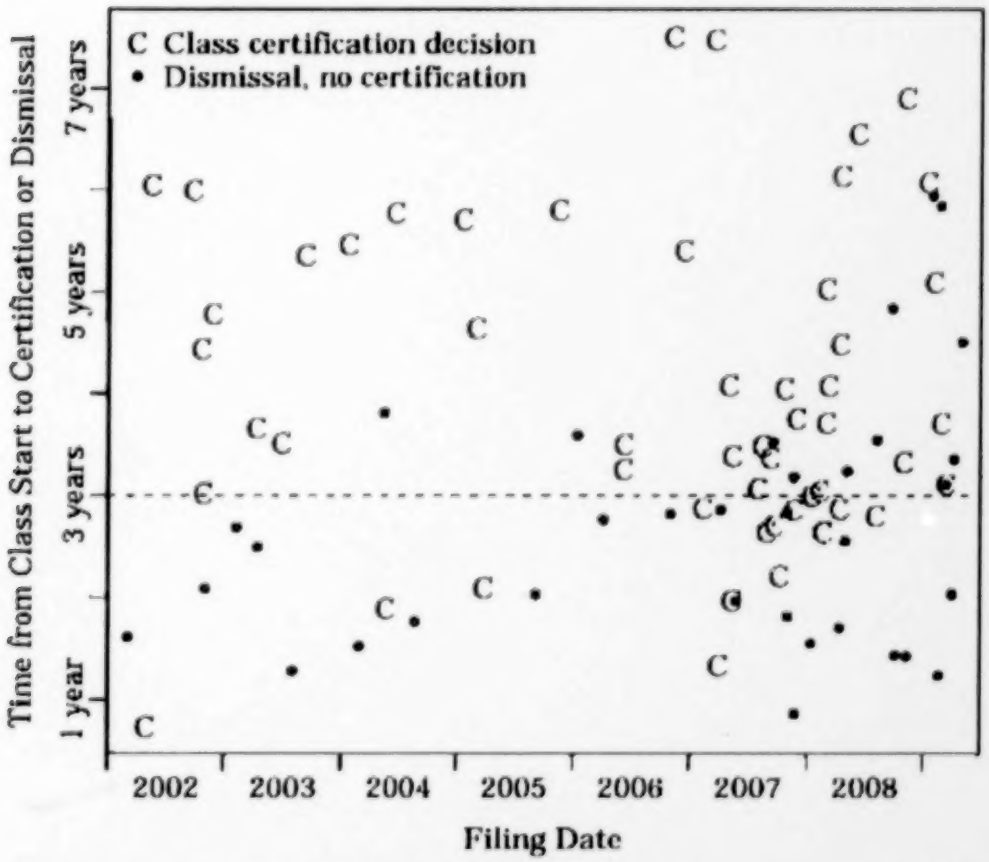
[7] 15 U.S.C. § 77m.

[8] 28 U.S.C. § 1658(b).

## B. Results

Figure 1 offers a graphical summary of an analysis of the 86 securities class actions filed during 2002-2009 asserting claims only under §§ 11 or 12 and thus subject to the three-year period of Securities Act § 13, 15 U.S.C. § 77m.

FIGURE 1. TIME FROM THE START OF THE CLASS PERIOD TO A CERTIFICATION DECISION OR A DISMISSAL WITHOUT CERTIFICATION IN CASES ASSERTING ONLY §§ 11 OR 12 CLAIMS, 2002-2009




The results are striking: § 13's three-year limitations period, denoted in the Figure as a horizontal dashed line, would have expired prior to a certification decision in 73 percent (38 of 52) of cases that reached a certification decision and in 44 percent (38 of 86) of all filed cases. To provide more detail on the 52 cases

depicted in the Figure that reached a certification decision, § 13's three-year limitations period would have expired before an order on a motion for class certification in 11 of the 12 cases reaching such an order. And that period would have expired before an order preliminarily approving a proposed class settlement in 29 of the 42 cases reaching such an order.[9]

This same approach also permits characterization of the efficiency costs of the Second Circuit's recent decision[10] to further limit *American Pipe*'s reach in the context of claims brought under § 10(b) of the Securities Exchange Act and SEC Rule 10b-5, as governed by the five-year limitations period Congress has prescribed for such claims.[11] To that end, Figure 2 presents a graphical summary of an analysis performed on a random sample of 500 cases drawn from the roughly 1200 securities class actions asserting § 10(b) claims filed during 2002-2009.

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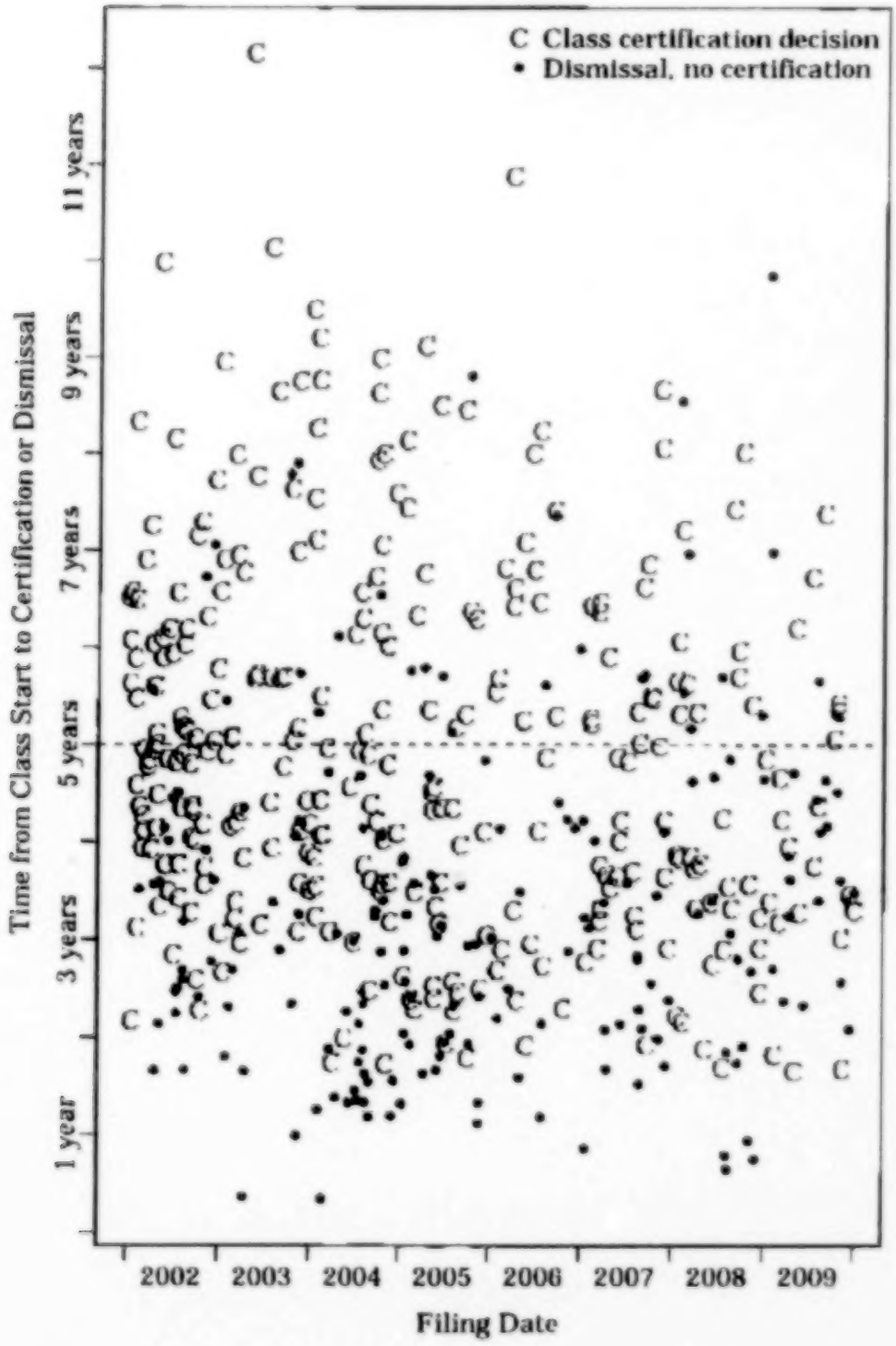
[9] Two cases in the sample of §§ 11 and 12 cases produced both an order on a motion for certification and a preliminary order approving a class settlement beyond the three-year limitations period. This explains why the numbers reported for cases falling into each category sum to 40 (11 + 29) rather than 38, and why the numbers reported for cases reaching the two types of orders sum to 54 (12 + 42) rather than 52.

[10] *See SRM Glob. Master Fund Ltd. P'ship v. Bear Stearns Cos.*, 829 F.3d 173, 177 (2d Cir. 2016).

[11] *See* 28 U.S.C. § 1658(b) (requiring securities fraud cases brought under § 10(b) and Rule 10b-5 to be brought within "5 years after such violation").

FIGURE 2. TIME FROM THE START OF THE CLASS PERIOD TO A CERTIFICATION DECISION OR A DISMISSAL WITHOUT CERTIFICATION IN CASES ASSERTING § 10(b) CLAIMS, 2002-2009



The results are again striking: The five-year limitations period that applies to § 10(b) claims would have expired prior to a certification decision in 44 percent (135 out of 307) of cases that reached a certification decision and in 27 percent (135 out of 500) of all filed cases in the sample.[12] To provide more detail on the 307 cases depicted in Figure 2 that reached a certification decision, the five-year limitations period that applies to such claims would have expired prior to an order on a certification motion in 42 of 86 cases reaching such an order. And that period would have expired prior to an order preliminarily approving a settlement class in 97 of 227 cases reaching such an order.[13]

Using the above estimates and extrapolating to the roughly 4355 securities class actions filed since 1996 provides a more general estimate for the set of cases

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[12] As with the prior analysis, keying the calculation of elapsed time to the start of the class period is consistent with the weight of authority among lower courts that § 1658(b)'s five-year limitations period is subject to an event-accrual rule—*i.e.*, the date of the misrepresentation or the completion of (or commitment to complete) the purchase or sale of the security. *See, e.g.*, *McCann v. Hy-Vee, Inc.*, 663 F.3d 926, 932 (7th Cir. 2011) (holding that the five-year limitations period starts upon misrepresentation); *In re Exxon Mobil Corp. Sec. Litig.*, 500 F.3d 189, 200 (3d Cir. 2007) (same); *see also Arnold v. KPMG LLP*, 334 F. App'x 349, 351 (2d Cir. 2009) (explaining that the limitations period starts when parties commit to purchase or sell). The margin of error for the above estimates, calculated at the standard 95 percent confidence level, is ±5.5 percent for the first and ±3.9 for the second. In other words, the 95 percent confidence interval is 38 to 50 percent for the first estimate and 23 to 31 percent for the second.

[13] Four of the cases in the sample of § 10 cases produced both an order on a motion for certification and a preliminary order approving a class settlement beyond the five-year limitations period, which explains why the numbers reported for cases falling into each category sum to 139 (42 + 97) rather than 135.

filed over the 20-year period from 1996 to 2016: Plaintiffs seeking to preserve their rights in the event of denial of class certification would have needed to file protective actions in as many as 1175 cases.[14] Had even a handful of potential class members in each case done so as the end of the relevant three- or five-year limitations period approached, total filings, whether interventions or separate lawsuits, would have easily numbered in the thousands. Class members who did not do so would have forever lost their right to seek redress had class certification been denied.

### C. Discussion

While the above empirical analyses might raise the concern that the analyzed sample of securities class actions filed during 2002-2009 is somehow idiosyncratic, or that a sea-change in the composition of the case pool going forward will render any backward-looking estimate an uncertain guide to the future, several considerations suggest that the above estimates are, if anything, conservative.

First, the estimates do not account for the fact that a case that never produces a certification order, but is not dismissed until *after* the limitations period expires, can still generate protective filings. Figures 1 and 2 both suggest the existence of a non-trivial number of such cases—these are cases denoted as dots that

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[14] *See* Alexander Aganin, *Securities Class Action Filings: 2016 Year in Review*, Cornerstone Research 40 (2017), https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2016-YIR (reporting more than 4,355 securities class action lawsuits between 1996 and 2016). The "1175 cases" figure was derived by multiplying the 4,355 cases filed since 1996 by the above-reported 27 percent estimate of the proportion of cases in the 500-case sample that reached a certification order after the five-year limitations period.

fall above the horizontal dashed line drawn at the relevant three- or five-year limitations period. In such cases, a motion for certification may have been filed but not yet adjudicated when the court granted a pending motion for judgment on the pleadings or summary judgment. An absent class member in such a case would have faced the expiration of the relevant repose period with class status uncertain, and would thus have needed to file a protective action in order to preserve the right to pursue a claim.

Second, the above estimates do not account for the fact that, under the Second Circuit's approach, a potential class member's rights can be cut off by the relevant three- or five-year limitations period because of *any* defect that is fatal to a class claim, not just denial of certification.[15] Without *American Pipe*'s protective rule, absent class members who lack complete confidence that they have canvassed all possible legal hurdles to recovery may make protective filings even after class certification has been granted.[16]

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[15] The petitioner's situation in the prior *IndyMac* case is illustrative, as the attempted intervention came after the district court dismissed some of the class claims on standing grounds because the lead plaintiff had not purchased some of the securities in question. *Police & Fire Ret. Sys. of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95, 109 (2d Cir. 2013), *cert. dismissed as improvidently granted sub nom. Pub. Emps.' Ret. Sys. of Miss. v. IndyMac MBS, Inc.*, 135 S. Ct. 42 (2014); *see also Griffin v. Singletary*, 17 F.3d 356, 360 (11th Cir. 1994) (noting that a potential class member's concern about defects in the named representative's standing to pursue certain class claims may also generate protective filings).

[16] It is also the case that putative class members, having made protective filings without *American Pipe*'s assurance, may ultimately choose not to pursue their claims in cases in which class certification is later denied, perhaps because certification-related

A final reason the above estimates are likely to be conservative requires consideration of possible dynamic responses by litigants and judges to a decision by this Court limiting *American Pipe*'s reach. On the one hand, a decision limiting *American Pipe* would create perverse incentives for litigants to delay pre-trial proceedings to cut off potential class members' opt-out rights. Class action defendants could be expected to prolong pre-trial and certification proceedings as long as possible to extinguish any remaining live claims against them. After all, once the relevant three- or five-year limitations period has lapsed, a decision denying class certification would become a victory on the merits as to any potential class members who did not take protective action. Even lead class counsel might have a disincentive to hurry, since the running of the limitations period would leave absent class members who have not taken protective action with no further chance to opt out, thus preventing any class member who is dissatisfied with the course of the litigation or a proposed settlement from pursuing a separate action.[17] If litigants on either side of the "v."

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discovery or the court's order denying certification reveals weaknesses in the case that were not apparent at the time of the protective filing. This is important, for it shows that the efficiency costs of protective filings following a decision by this Court restricting *American Pipe*'s reach will not be limited to cases in which the district court ultimately grants certification.

[17] This aligns with the longstanding recognition by courts and commentators of possible agency costs in representative actions and the role Rule 23's opt-out mechanism plays in mitigating those costs. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626-27 (1997); *see also Principles of the Law of Aggregate Litigation* § 2.07(a) (Am. Law Inst. 2010); John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 Colum. L. Rev. 370, 376-77 (2000).

slow-walk the proceedings, more cases could be expected to reach certification decisions beyond the relevant three- or five-year limitations period.

On the other hand, the Second Circuit's approach limiting *American Pipe*'s reach might lead district judges to speed up their consideration of securities cases in an effort to preserve the ability of absent class members to make meaningful decisions about how to pursue their rights. To be sure, such prioritization of securities cases would not be costless. A judge could not move securities cases up in the queue without causing other litigants to wait longer for justice. Accelerating pre-certification proceedings would also necessarily shorten the time devoted to briefing and decision on lead-plaintiff and Rule 12(b)(6) motions as well as certification-related discovery, thus potentially eroding the quality of judicial decision-making.[18] But in theory, judicial prioritization of securities cases could place countervailing, downward pressure on the volume of protective filings in the event of a decision limiting *American Pipe*'s reach.

Measuring the relative size of these competing effects is challenging. It is difficult, as empirical scholarship in civil procedure shows, to gauge behavioral responses to changes in procedural rules.[19] Still, the

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[18] Shortening pre-certification proceedings might also come at the cost of less time for the litigants to negotiate a settlement in the shadow of the unknown outcome of a certification decision.

[19] A recent example is debate over the effect of this Court's decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and its progeny. *See, e.g.*, David Freeman Engstrom, *The* Twiqbal *Puzzle and Empirical Study of Civil Procedure*, 65 Stan. L. Rev. 1203, 1223-29 (2013); Jonah B. Gelbach, *Can the Dark Arts of the Dismal Science Shed Light on the Empirical Reality of Civil Procedure?*, 2 Stan. J. Complex Litig. 223, 229-37 (2014).

graphical presentations provided above give good reason to conclude that the effect of the former (litigant) response will equal or even exceed the effect of the latter (judicial) response. Figure 1 provides especially strong evidence in this regard: Cases that reached a certification decision *before* § 13's three-year limitations period expired tend to cluster just below that cutoff, making strategic delay without *American Pipe* plausible. By contrast, cases that reached a certification decision *after* § 13's three-year limitations period tend to be more diffusely distributed above that cutoff. Indeed, in more than half (23 out of 38) of these cases, a judge would have needed to accelerate precertification proceedings by more than a full year in order to reach a certification decision before § 13's three-year limitations period expired.[20]

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[20] A further reason to doubt district judges' ability to accelerate the certification process is what appears to be a trend toward substantial discovery prior to certification rulings, including expert testimony, and the resulting blurring of merits and non-merits discovery. *See, e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351-54 (2011) (requiring "significant proof" of "a general policy of discrimination" in order to meet Rule 23's commonality requirement under Title VII); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008) (noting the need for district courts to "formulate some prediction as to how specific issues will play out" to assess Rule 23's predominance requirement (quoting *In re New Motor Vehicles Can. Exp. Antitrust Litig.*, 522 F.3d 6, 20 (1st Cir. 2008))).

## II. SOUND PRINCIPLES OF RESEARCH DESIGN COUNSEL AGAINST A "NATURAL EXPERIMENT" APPROACH OR A NARROW FOCUS ON OPT-OUT ACTIONS IN MEASURING THE EFFICIENCY COSTS OF A DECISION LIMITING *AMERICAN PIPE*'S REACH

### A. The Challenges of an Ideal "Natural Experiment" Approach to Measuring Protective Filings

An alternative way to estimate the expected quantum of protective filings were *American Pipe* tolling held inapplicable to repose periods would be to use the "natural experiment" approach commonly used in the social sciences and empirical legal studies scholarship.[21] The Second Circuit's June 2013 *IndyMac* decision—the first case in which that court held *American Pipe* inapplicable to repose periods[22]—would seem to provide an opportunity to use this approach. In principle, one could compare the quantum of protective filings across a "comparison" set of cases filed prior to *IndyMac* in which the statutory repose period expired *before IndyMac* and a "treatment" set of cases that were filed before *IndyMac* but in which the statutory repose period didn't expire until *after IndyMac*.[23]

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[21] *See, e.g.*, Jonah B. Gelbach & Jonathan Klick, *Empirical Law and Economics, in* Oxford Handbook of Law and Economics (Francesco Parisi ed., 2017).

[22] *IndyMac*, 721 F.3d at 109.

[23] The resulting "straddle" method—examining cases filed before a rule change, and then comparing the incidence of litigation events that occur before or after that change—is a common means of mitigating selection bias. *See* William Hubbard, *Testing for Change in Procedural Standards, with Application to* Bell Atlantic v. Twombly, 42 J. Legal Studies 35, 37-40 (2013).

But there are several obstacles to successfully deploying this approach. First, the *IndyMac* case concerned only claims brought under §§ 11 and 12 of the Securities Act and so was merely the opening salvo among the Second Circuit's holdings limiting *American Pipe*'s reach. It was only quite recently, in 2016, that the Second Circuit expanded its rule to the far more numerous claims brought under § 10(b) of the Securities Exchange Act and SEC Rule 10b-5.[24] Consequently, many putative class members in cases filed in district courts within the Second Circuit would have been uncertain as to whether they would enjoy *American Pipe*'s protection if class certification were denied. Such uncertainty would blunt any "treatment" effect of Second Circuit case law.

A second obstacle comes at the intersection of the current circuit split on *American Pipe*'s application to repose periods and the liberal rules governing personal jurisdiction and venue for claims brought under the federal securities laws. While the Sixth and Eleventh Circuits recently joined the Second Circuit in limiting *American Pipe*'s reach,[25] the Tenth Circuit long ago took the opposite position.[26] The remaining circuits have yet to decide one way or the other. This is important because the nationwide service-of-process and permissive venue provisions in the federal securities laws grant individual plaintiffs liberal choice

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[24] *See SRM Glob. Master Fund*, 829 F.3d at 177 (holding that *American Pipe* does not apply to the five-year repose period applicable to Rule 10b-5 claims in 28 U.S.C. § 1658(b)(2)).

[25] *See Stein v. Regions Morgan Keegan Select High Income Fund, Inc.*, 821 F.3d 780, 794-95 (6th Cir. 2016); *Dusek v. JPMorgan Chase & Co.*, 832 F.3d 1243, 1249 (11th Cir. 2016).

[26] *Joseph v. Wiles*, 223 F.3d 1155, 1168 (10th Cir. 2000).

of fora in which to bring suit.[27] The absence of significant jurisdictional hurdles further blunts the treatment effect of the Second Circuit's changes in case law. If litigants who might wish to pursue separate actions can duck the Second Circuit's holding by filing suit in the Tenth Circuit or the circuits that have not yet considered *American Pipe*'s reach, then an empirical analysis keyed to case filings within the Second Circuit will understate, perhaps substantially, the impact that a Supreme Court decision limiting *American Pipe* would have across the entire federal system.

Even if these problems somehow could be overcome, there is a third problem: insufficient data.[28] As an initial matter, claims brought under §§ 11 and 12 of the

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[27] *See* Securities Act, § 22, 15 U.S.C. § 77v(a), and Securities Exchange Act, § 27, 15 U.S.C. § 78aa(a). As to personal jurisdiction, most lower courts agree that plaintiffs suing under either the Securities Act (*e.g.*, §§ 11 or 12 claims) or the Securities Exchange Act (*e.g.*, Rule 10b-5 claims) need show only that the defendant has minimum contacts with the United States as a whole rather than individual states. *See, e.g.*, *SEC v. Ross*, 504 F.3d 1130, 1139-40 (9th Cir. 2007); *In re Fed. Fountain, Inc.*, 165 F.3d 600, 601-02 (8th Cir. 1999); *United Liberty Life Ins. Co. v. Ryan*, 985 F.2d 1320, 1330 (6th Cir. 1993); *Hilgeman v. Nat'l Ins. Co. of America*, 547 F.2d 298, 301 (5th Cir. 1977); *SEC v. Sharef*, 924 F. Supp. 2d 539, 544 (S.D.N.Y. 2013). As to venue, the securities laws afford plaintiffs wide choice regarding where to file. The venue provision in § 27 of the Securities Exchange Act is especially permissive, rendering venue proper "in the district wherein any act or transaction constituting the violation occurred." 15 U.S.C. § 78aa(a). As one court put it, "the intent of the venue and jurisdiction provisions of the securities laws is to grant potential plaintiffs liberal choice in their selection of a forum." *Ritter v. Zuspan*, 451 F. Supp. 926, 928 (E.D. Mich. 1978).

[28] *See* Stanford Securities Litigation Analytics, *supra* note 5.

Securities Act are not sufficiently numerous to generate reliable empirical estimates.[29] But even if we were to use the more numerous cases asserting claims under § 10(b) and Rule 10b-5, the short time since the Second Circuit's June 2013 *IndyMac* decision would severely limit the available treatment sample. For instance, in 8 of the 75 cases asserting § 10(b) claims filed in the Second Circuit between June 2011 and June 2013, the repose period expired as to at least some putative class members even before *IndyMac* was decided, once more blunting the treatment effect. And in 13 of the 75 cases, the entire case terminated before *IndyMac*, leaving no possibility for any treatment effect at all.[30] We also face what statisticians call a right-censoring problem: In 32 of the 75 cases asserting § 10(b) claims filed over the same June 2011 to June 2013 span, the repose period has not yet expired even as of this writing for at least some putative class members.

Restricting our treatment sample to only those cases filed after the *IndyMac* decision would fare no better. Indeed, in all but two of the 84 cases asserting § 10(b)

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[29] From 2007 to the present, district courts within the Second Circuit saw roughly seven lawsuits per year asserting §§ 11 and 12 claims. Claims under § 14 of the Securities Exchange Act were also sparse, having only recently increased from a dozen per year nationwide during the 2000s to a few dozen per year more recently, fueled by a rise in merger-objection suits. *See* Stefan Boettrich & Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2016 Full-Year Review*, NERA Economic Consulting 5 fig.3 (Jan. 2017), http://www.nera.com/content/dam/nera/publications/2017/PUB_2016_Securities_Year-End_Trends_Report_0117.pdf.

[30] One case falls into both categories, in that the repose period would have run as to at least some putative class members, but the case terminated prior to *IndyMac*.

claims filed in the Second Circuit from June 2013 to June 2015—the two-year span after the Second Circuit's *IndyMac* decision—the repose period still has not yet run for all putative class members as of this writing. And in 21 of these 84 cases, the repose period has not yet run as to *any* putative class member, thus eliminating any possibility of a treatment effect. These various problems grow more acute—and afflict more of our case observations—as we move backward or forward in time from the Second Circuit's June 2013 *IndyMac* decision, significantly limiting the overall quantity and quality of available data observations.

### B. Respondents' Misplaced Reliance upon "Opt-Out" Studies

This discussion shows that the most obvious "natural experiment" approach suffers so many problems as to be practically useless. In Part I, *supra*, we offered an alternative empirical approach. We turn now to the approach that respondents took in their Brief in Opposition to Certiorari: Respondents cited a study published by Cornerstone Research[31] for the proposition that the flow of protective filings will be trivial. BIO 21-22. The Cornerstone study suffers from numerous flaws, at least when deployed in support of respondents' claims about protective filings.

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[31] *See* Amir Rozen, Brendan Rudolph, & Christopher Harris, *Opt-Out Cases in Securities Class Action Settlements: 2012-2014 Update*, Cornerstone Research (2016), https://www.cornerstone.com/Publications/Reports/Opt-Out-Cases-in-Securities-Class-Action-Settlements-2012-2014; Amir Rozen, Brendan Rudolph, & Christopher Harris, *Opt-Out Cases in Securities Class Action Settlements*, Cornerstone Research (2013), https://www.cornerstone.com/Publications/Reports/Opt-Out-Cases-in-Securities-Class-Action-Settlements.

First, the Cornerstone study tallies individual "opt out" actions only in class actions that ultimately settled. The study therefore does not count protective filings in cases where class certification ultimately was denied or in cases that otherwise do not reach settlement (*e.g.*, because of a dispositive motion). Yet individual filings may be just as wasteful in such cases as in cases that settle, because putative class members who have made protective filings out of uncertainty about *American Pipe*'s reach might choose to drop their claims after denial of class certification or pre-trial termination.

Second, Cornerstone's study considers only separate filings and does not appear to consider interventions filed by putative class members in the proceedings in which class certification was originally sought. This is important because interventions may be a significant channel through which putative class members will preserve their rights if *American Pipe* tolling is unavailable. They also consume substantial judicial resources. Retired Federal Judges Amicus Cert. Br. 16 (noting that interventions can "consume substantial resources of the court and the parties").

Finally, the Cornerstone study is hampered by its limited time-frame in relation to the relevant Second Circuit decisions. The Cornerstone data ends in 2014, mere months after the Supreme Court dismissed the *IndyMac* case as improvidently granted, 135 S. Ct. 42, and two years *before* the Second Circuit extended its *IndyMac* decision to statutes of repose for § 10(b) actions.[32] There is thus practically no opportunity for the effects of *IndyMac* to be reflected in the filings included within the scope of the study. In other words, the Cornerstone study suffers from a severe version of the research-design problems

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[32] *SRM Glob. Master Fund*, 829 F.3d at 177.

that afflict the "natural experiment" approach described above.

## III. LIMITING *AMERICAN PIPE*'S REACH WOULD NOT YIELD ANY COUNTERVAILING BENEFIT

A potentia[1] counter to the clear efficiency concerns raised above is that protective filings, though consuming substantial judicial and private resources, would nonetheless permit defendant entities to gauge their potential liability in the event certification is denied, thus justifying any efficiency cost. In reality, however, protective interventions and filings would offer defendant entities who wish to assess their potential liability if certification is denied strikingly little guidance. The reasons are two-fold.

First, the filing of the class complaint itself provides defendants with sufficient information about the substance of the claims against them and the identities of the claimants to satisfy the purpose of limitations periods of ensuring that defendants have notice of their potential liability within a defined time window. *Am. Pipe*, 414 U.S. at 554-55; Pet. Br. 33-34.

Second, many defendants in securities class actions have additional, and even more precise, means of determining their potential legal liability. Large securities holders—who are also most likely to have independently marketable claims—are required by the federal securities laws to make annual, publicly available Form 13F filings describing their investment positions above a certain dollar threshold.[33] And the investor relations offices of larger issuers often track such information for a range of purposes.

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[33] *See* 15 U.S.C. § 78m(f)(1).

But even if defendants do not track Form 13F data in the normal course of business, various free and publicly available online services do it for them.[34] Thus, a defendant can, with only a few online clicks, learn which among its larger investors were net purchasers or sellers during the class period (*i.e.*, the period the alleged fraud was "live"). The result is an estimate of potential liability that is far more useful than a gross tally of interventions or separately filed actions.[35]

In short, the efficiency toll of the Second Circuit's decision limiting *American Pipe*'s reach is not only likely to be significant, but also entirely unnecessary.

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[34] *See, e.g.*, *Facebook, Inc. (FB): Major Holders*, Yahoo! Finance, http://finance.yahoo.com/q/mh?s=FB+Major +Holders (last visited Mar. 3, 2017) (cataloging "major holders" of Facebook stock); *Ownership & Insiders: FB*, Fidelity, https://eresearch.fidelity.com/eresearch/evaluate/fundamentals/ownership.jhtml?stockspage=ownership&symbols=FB (last visited Mar. 3, 2017) (same).

[35] It is noteworthy that district judges regularly perform a somewhat similar analysis in determining which among the "lead plaintiff" candidates has the "largest financial interest," as required under the Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I). *See, e.g.*, *Foley v. Transocean Ltd.*, 272 F.R.D. 126, 127-28 (S.D.N.Y. 2011) (discussing the methodology district judges employ, including, *inter alia*, examining the "net shares purchased" and "net funds expended" during the class period by lead-plaintiff candidates). And consulting firms have long developed sophisticated models of exposure in securities fraud cases. *See, e.g.*, Kenneth R. Cone & James E. Laurence, *How Accurate Are Estimates of Aggregate Damages in Securities Fraud Cases?*, 49 Bus. Lawyer 505, 506-08 (1994) (assessing such models as developed by litigation consultant Lexecon Inc.—now Compass Lexecon—and competitor consultancies).

## CONCLUSION

For the foregoing reasons, the Court should reverse the decision below and hold that the *American Pipe* rule applies in full to § 13's three-year limitations period.

Respectfully submitted,

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